IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3585 of 1997

with

SPECIAL CIVIL APPLICATION No 6902 of 1996

with

Special Civil Application No.6702, 6703 & 6704 of 1996

with

Special Civil Application No. 6833 of 1996

with

Special Civil Application No. 6861 of 1996

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SABARKANTHA DISTRICT COOP MILK PRODUCERS UNION LTD

Versus

SALES TAX OFFICER (1)

Appearance:

MR RD PATHAK for Petitioners

M/S MG DOSHIT & CO for Respondent

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

and

MR.JUSTICE A.R.DAVE

Date of decision: /11/2000

CAV JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

A common order is being passed in this group of petitions (Special Nos.3585/87, 6702/96, 6703/96, 6704/96, 6902/96, 6833/96 and 6861/96) as the petitioners in all the cases are dealers in milk powder and condensed milk. They challenge the constitutional validity of Gujarat Sales Tax (Validation) Ordinance, 1977 followed by the Gujarat Sales Tax (Validation) Act, 1999.

2. Section 5 of the Gujarat Sales Tax Act, 1969 (hereinafter referred to shortly as the Act) empowers the State Legislature to specify goods in Schedule I of the Act on which no sales tax shall be charged or payable subject to the condition and exceptions specified in the Schedule. In the sub-entry (i) of entry 10 of Schedule I (as it existed in the relevant assessment years prior to substitution of New Schedule I by Gujarat Act No.9 of 1992 w.e.f. 1.4.1992) `Milk, whole or separated or reconstituted' was exempt from payment of Sales Tax.

3. The High Court of Gujarat in the case of Chunilal Mayachand Vs. State of Gujarat, 1992 (86) STC 105 interpreted sub-entry (i) of entry 10 relating to "milk, whole or separated or reconstituted "to include within those words `milk powder' as well.

4. The State Legislature in promulgating the impugned Ordinance No.1/97 followed by the impugned Gujarat Act No.8 of 1997 has amended sub-entry (i) of entry 10 of Schedule I restrospectively to add in the said entry words "except milk powder". The objects and reasons for promulgating the Ordinance and the Act with retrospective effect are contained in the statement annexed to the Ordinance which reads thus:-

"Statement: Since the inception of the Gujarat Sales Tax Act, 1969, Sales Tax was levied and collected on milk powder. The High Court

> of Gujarat in the case of Chunilal Mayachand Vs. State of Gujarat [1992 (86) STC 105] interpreted the entry relating to milk, whole or separated or reconstituted as appearing in sub-entry (i) of Entry 10 of Schedule I to the Act as it existed prior to 1st April, 1992. In the context of the said judgement, a doubt has arisen as to whether `milk powder' was exigible to tax and levy on tax thereon was validly made or not. In order to remove any such doubt and to make the intention of the Legislature clear, the milk powder is excluded from the expression `milk, whole or separated or reconstituted' appearing in the said sub-entry (i) of entry 10 as it existed prior to 1st April, 1992 and the levy and collection of tax thereon is validated."

As has been stated above, the Ordinance of 1997 became an Act i.e. Gujarat Act No. 1997 and received the assent of the Governor published in the Gujarat Government Gazette Extraordinary dated 15.3.1997.

5. Learned Counsel Shri R.D.Pathak appearing for the petitioners, who are all dealers in milk & milk powder and other dairy products, while assailing the constitutional validity of the Ordinance/Act submits that the statement containing objections/reasons annexed to the Ordinance makes it apparent that the State Legislature has thereby made an attempt to upset the judicial verdict and tried by legislative power to interfere with the judicial power of the Court.

6. It is next contended that in the entry `milk, whole or separated or reconstituted', milk in powder form or condensed milk was clearly included. On the existing entry (i) of entry 10 Schedule I, the petitioners, in some of the cases, earlier collected tax but refunded them to the purchasers and in some other cases no sales Tax was collected on sale of milk powder treating it exempt from payment of Sales Tax. It is submitted that the State Legislature could not have passed a law with retrospective effect to create a situation whereby it is impossible for the petitioners as dealers to recover Sales Tax on the past sale transactions which are completed and closed. The same transactions are now exposed to assessment and levy of tax on the quantities of milk powder already sold and/or which would be sold in future.

7. On behalf of the petitioner, it is contended that the attempt of the Legislature to impose sales tax on sale of milk powder retrospectively is a serious encroachment on the fundamental right of the petitioners to carry on their trade which is guaranteed under Article 19(1)(g) of the Constitution of India. It is submitted that the imposition of tax on milk powder with retrospective effect is unreasonable and puts the dealer in a situation where they are unable to legitimately pass on the burden of tax to its purchasers i.e. retailers and the ultimate consumers. It is submitted that the Commissioner of Sales Tax as Head of the Sales Tax Department had issued impugned Circular (Annexure A-1) to nullify the judgement of the High Court by advising all the lower Sales Tax Authorities not to refund the Sales tax collected on milk powder. The Legislature by enacting the Ordinance and the Act has similarly made an attempt to sit over the judicial verdict of this Court. It is submitted that such retrospective legislation is beyond the legislative power of the State.

8. Learned Counsel Shri M.G.Doshit, appearing for the State of Gujarat in supporting the Ordinance and Act submits that the power of the State Legislature to legislate prospectively or retrospectively is unquestionable. The power of Parliament and the State Legislature to make laws is derived from Article 245, 246 and 248 of the Constitution. The commentaries on the shorter Constitution of India by Durgadas Basu was relied which reads as under:-

> "There is nothing in he articles to provide that Indian Legislatures do not possess the right to make retrospective legislation which every sovereign legislature possesses. The power to make a law includes the power to give it retrospective effect. [Sundaramiar Vs. State of Andhra Pradesh (1959) SCR 1422, Nandumal Vs. State of Uttar Pradesh AIR 1992 SC 2084]. The only express limitation imposed upon the powers of a prospective legislation is that contained in Article 20(1) viz. that it cannot make a retrospective penal law. Any other law may, therefore, be made retrospective under the Constitution including taxing laws provided no fundamental right is infringed by reason of taking away a vested right by the restrospective legislation such as Article 14 & 19. (See Union of India Vs. Madangopal 1954 SC 541, Sidkari Kharkhana Vs. Collector, AIR 1979 SC 197)."

9. The power of the State Legislature therefore to pass a retrospective legislation in the nature of a validiting Act is unquestionable. It is true that in the garb of legislation, the Legislature cannot usurp the power of adjudication assigned to Judiciary. The Legislature can also not directly overrule a judicial decision but the Legislature is competent to render ineffective the judgement of a Competent Court, by changing the basis of the legislative enactment upon which the judgement had been founded, and thus remove the causes of ineffectiveness of the proceedings in which the decision had been made. (See Krishna Vs. Union of India, AIR 1975 SC 139, Indira Gandhi Vs. Rajnarayan AIR 1975 SC 2299, Tirth Vs. State of Uttar Pradesh AIR 1973 SC 405 and Prithvi Cotton Mills Vs. Broach Municipality AIR 1970 SC 19. The power to give retrospective effect to any legislation has to be exercised subject to constitutional limitation (See Yadlapati Vs. State of Andhra Pradesh, AIR 1991 SC 704).

10. The statement annexed to the Ordinance conveys the object and reason of retrospective legislation. The Law has been amended restrospectively to validate the assessment, collection or recovery of tax already made on Milk powder. Learned counsel appearing for the State in supporting the legislation submits that the interpretation of sub-entry (i) of entry 10 of Schedule I made by the High Court of Gujarat in the case Chunilal Mayachand (Supra) had created a doubt on legislative intent which necessitiated its removal by impugned legislation.

11. On the other hand on behalf of the petitioner, it is contended that in the garb of removal of a doubt said to have been created by a decision of the Court, attempt has been made to nullify the effect of the judicial verdict.

12. In order to examine the merits of the above contention, we have allowed the Learned Counsel for the parties to address us on the meaning and intent of sub-entry (i) of entry 10 of Schedule I as it existed originally, before it was amended by the Ordinance and the Act to exclude `milk powder' from the entry. Books on Dairy Technology including a Book titled `Outlines of Dairy Technology' by Sukumar De in its relevant parts were read before us. One of the petitioner companies', Expert in Dairy Technology appeared before us to explain the meaning of the word "milk, whole separated or reconstituted.". Learned Counsel appearing for the petitioner is right in submitting that entries concerning

goods in the Sales Tax Law should be assigned meaning as commonly understood in commercial sense and to ascertain its commercial meaning, the meaning assigned to it by those dealing in that commodity has to be gathered. It is from that point of view and not with a view to examine the correctness of the decision of the Division Bench of this Court in the case of Chunilal Mayachand (Supra) that we have heard the parties at length on the meaning and interpretation of the relevant entry prior to and after its amendment. As is sought to be explained to us from the Books of Dairy Technology and the Encyclopedia of Science and Technology, `milk whole' is natural milk obtained from milch animals. The separated milk is obtained through a chemical process undertaken with apparatus & equipments whereby the fats are taken out from the whole milk in specified proportion leaving the residue called `toned milk' or `standardised milk'. The reconstituted milk is the milk obtained by again reconstituting the separated milk. Condensed milk and milk powder added with water can constitute reconstituted milk.

13. The original entry was interpreted and understood by the Division Bench to include in it milk powder which according to the Court in Chunilal's case (Supra) is nothing but solid form of milk. As was contended in the case of Chunilal (Supra) and now before us is that the Legislature intended to exempt from sales tax only milk in liquid form sold to common people for daily use and consumption. Liquid milk being a necessity of common man, the Legislature intended to keep it free from imposition of Sales Tax. The Legislature however never intended that commercial milk products like milk powder manufactured by Food Industries should be made exempt from payment of tax. The interpretation of the said entry as made by the Court in the case of Chunilal (Supra), therefore, made it necessary for the State Legislature to intervene by way of retrospective legislation not only to save the tax already imposed and collected but also to continue imposition of tax on commercial food product like milk powder. On behalf of the State, it is therefore submitted that there is a sincere and genuine attempt made by the retrospective legislation to clear the doubt that had been created by the judgement of the Division Bench of this Court in the case of Chunilal (Supra) and to make clear the legislative intent with sole purpose to safeguard the Revenue.

14. The legislative device to validate even retrospectively the laws found by the Court to be

defective or expressing a different intention is well recognised and approved even by the Courts. In the instant case, the relevant entry in Schedule I of exempting "milk, whole, separated or reconstituted" was interpreted to include milk in solid form such as milk powder. The view of the Legislature is that the exemption was intended only for milk in liquid form as sold in the market or used by the common man. As is the stand taken on behalf of the State, the Legislature never intended to exempt from sales tax milk in powder form which is a product associated with the milk industry. On the basis of the existing entry and before its interpretation by the Division Bench of the Gujarat High Court to include within the entry milk powder, various Sales Tax Authorities had subjected `milk powder' to assessment and levy of sales tax. The Division Bench decision of the Gujarat High Court in the case of Chunilal (Supra) had created a situation whereby the assessment and levy of tax on milk powder were rendered invalid requiring the State, in majority of cases, to make refunds of sales tax. It is to meet such a situation which arose due to interpretation placed on the entry in the Sales Tax Act by the Court that the necessity arose to bring in a Validation Act having retrospective operation. It would not be correct to criticise the legislative action as an attempt to use legislative device for overruling a judicial verdict. As we see by bringing a Validation Act with retrospective effect, the Legislature has tried to more clearly express legislative intent because the existing exemption entry in Schedule I concerning milk in various forms did not satisfactorily convey the meaning that was sought to be assigned to the entry by the Legislature. Such retrospective Validations Act for the purpose of making clear the legislative intent and to save the revenue came to be challenged in Courts in number of cases. The challenge was repelled by upholding such acts. See the following observations of the Supreme Court on the basis of several previous decisions of that Court in the case of Comorin Match Industries P.Ltd. Vs. State of Tamilnadu (1996) 4 SCC 281:-

> "The Legislature ordinarily cannot reverse a decision of a court of law given in exercise of judicial power. But if a High Court quashes several assessment orders by interpreting a taxing statute in a certain manner and that interpretation is nullified by the subsequent judgement of the Supreme Court and the statute itself is amended as a result of which the law on the basis of which the High Court's judgement was

given is drastically altered, in such a situation, it is permissible for the Legislature, by a Validation Act, to declare the assessments as valid and binding notwithstanding the judgement of the High Court to the contrary."

15. In Madanmohan Pathak Vs.Union of India (1978) 2 SCC 50, similarly it was observed:-

"If a judgement is pronounced by a Court and the effect of that judgement is sought to be taken away by the Legislature by passing an Act without altering the statute on the basis of which the judgement was pronounced, then such legislation will not nullify the effect or force of the judgement pronounced by the Court in any manner. The Statute being what it was, the judicial interpretation of the statute could not be held to be erroneous by legislation imprimatur, but if the statute itself was amended retrospectively so that the very basis of the judgement disappeard, then it could not be said that the judgement was still in force and will have to be given effect to even though the Legislature had specifically laid down that the amended law will operate notwithstanding any judgement or decision or decree by the Court to the contrary."

(Underlining by us)

16. On the case in hand, the Legislature found that the exemption entry Schedule I of milk to convey its meaning as milk in various forms, due to unclear expression used by legislature, came to be interpreted by the Court to include in the said entry milk in solid or semi-solid form. The Legislature thought it necessary to bring in retrospective legislation to make the legislative intent clearer and validate its all previous proceedings for assessment and collection of tax on item `milk powder' which was never intended to be exempted from levy of Sales Tax.

17. We, therefore, find no constitutional infirmity in the impugned Ordinance and the Act which have been brought on the Statute book with retrospective effect to validate the assessment and levy of tax on milk powder.

18. The ancillary question which arises for consideration is more important in the context of effect of the impugned legislation. The question is whether any accrued or vested right of any of the affected parties is taken away by the impugned retrospective legislation. In

our opinion, the ancillary question raised as to the effect of the impugned legislation on completed and closed sale transactions of milk powder is concerned, we have to keep in mind the fundamental rule as noted in Craise on Statute Law VIIth Edition Page 387 to 388, wherein it is stated thus:-

> "It is the fundamental rule of (English) Law that no statute shall be construed as to have a retrospective operation, unless its language is such as plainly to require such a constrution and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have greater retrospective operation than its language renders necessary."

19. The petitioners in this case are more worried about the assessment made on turnover of milk sold but not taxed in view of the interpretation placed by the Division Bench of this Court in the case of Chunilal (Supra). Learned Counsel appearing for the petitioners submits that in some of the cases milk powder was sold to retailers and different cooperative societies without charging any tax. Those retailers have sold the milk powder to the consumers without charging tax. If the assessment on such sale transactions of milk powder are allowed to be reopened retrospectively, there would be tax liability created from a back date with no means available to the seller to recover the tax from the retailer or ultimate consumer. It is also submitted that in some of the cases, the Sales Tax amount collected on the turnover of milk powder was separately kept for refund and in some cases, the amount so collected from the purchaser of tax has already been refunded. If the retrospective legislation is construed to mean that it would also operate on such assessments completed where no tax was imposed on sale of milk powder an irreversible situation would be created placing the petitioners as sellers in a precarious financial predicament. In order to consider the impact of the impugned legislation on such completed orders of assessment resulting into exemption of Sales Tax on milk powder, it would be necessary to closely examine the provisions of the impugned Validation Act in its material parts. The impugned Ordinance has become an Act by the same name with no variation. We, will, therefore consider the provisions of the impugned Validation Act. Section 3 restrospectively amends sub-entry (i) of ENTRY 10 of Schedule I to insert in the said entry words "except milk powder" with a purpose to exclude from the entry of exemption `milk powder'. Clause (b) of Section 3(1)

intends to validate the levy, assessment and reassessment or collection of any Sales tax on milk powder which reads as under:-

"3.(1) Notwithstanding any judgement, decree or order of any court, tribunal or authority to the contrary

(a) in sub-entry (i) of entry 10 of Schedule I to the Gujarat Sales Tax Act, 1969 as in force before the date of the commencement of the Gujarat Sales Tax (Second Amendment) Act, 1992 (hereinafter referred to as "the said date"), the words "except milk powder" shall be and shall be deemed always to have been added at the end and formed part of the said sub-entry (i) before the said date;

(b) a tax on milk powder levied, assessed, reassessed or collected or purported to have been levied, assessed, reassessed or collected under the Act before the said date shall be and shall be deemed always to have been validly levied, assessed, reassessed or collected in accordance with law, as if the said sub-entry (i) of entry 10 as so construed had been in force at all material times when the said tax was levied, assessed, reassessed or collected, and accordingly -

(i) no suit, appeal, application or other proceeding shall be maintained or continued in any court or before any tribunal or authority whatsoever for the refund of the said tax.

(ii) no court, tribunal or other authority shall enforce any decree or order directing refund of the said tax.

(iii) recoveries shall be made in accordance with the provisions of the Act, of all amounts collected by dealers by way of such tax under the Act, as if, the said sub-entry (i) of entry 10 as so construed had been in force at

material times.

20. The apprehension expressed on behalf of the petitioners that the impugned legislation might allow reopening of assessments closed and completed where on milk powder no tax was assessed or charged, is clearly quelled by Section 3(2) of the impugned Validation Act which is a provision specifically enacted for removal of doubt. It needs to be reproduced in full as under:-

"3(2) For the removal of doubt, it is hereby cleared that -

(a) nothing in sub-section (1) shall be construed as preventing any person -

(i) from questioning, in accordance with the provisions of the Act, the levy, assessment, reassessment or collection of the aforesaid tax as so validated under sub-section (1), or

(ii) from claiming, in accordance with the provisions of the Act, refund of the aforesaid tax as so validated under sub-section (1) and paid by him in excess of the amount due from him.

(b) no act or omission on the part of any person before the said date, shall be punishable as an offence which would not have been so punishable if this Act had not come into force."

21. It is true that in the provisions of sub-section 2 of Section 3 (quoted above), there is no express mention that turnover of milk powder not assessed and brought to tax in the previous assessment years, on the basis of decision of the Division Bench of the High Court, would not be again assessed and brought to tax. By such omission in our considered opinion, the intention is clear enough of the Legislature that the impugned

retrospective legislation does not intend to affect the assessments completed and closed prior to the coming into force of the Validation Act where the turnover of milk powder was treated as exempt from tax and no tax was assessed or collected on it.

22. The general rule is "Every Statute which takes away or impairs vested right acquired under existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions already passed, must be presumed to be intended not to have a retrospective effect. A construction of the statute that affects vested right should never be adopted if the words are open to another constrution." See Vijaylaxmi Rice Mills Vs. State of Andhra Pradesh reported in AIR 1976 SC 1471.

23. The logical corollary of the general rule, that retrospective operation is not to be intended unless that intention is manifested by express words or necessary implication, a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary." (See AIR 1991 SC 101 and Deputy Collector Vs. S.Venkataramiah AIR 1996 SC 224.)

24. The above rule of not to give retrospective operation to the Statute larger than its language renders necessary should be applied with greater rigour to fiscal statutes because creation of financial liability from back date would not normally be presumed to have been intended by the statute unless there is an express intention to the contrary in that statute itself. Fiscal legislation imposing liability is generally governed by normal presumption that it is not retrospective and a cardinal principle of the Tax Law is that law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication.
25. The assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication permits such reassessment. A provision which is in terms retrospective and has effect of opening of liability is required to be subjected to a rule of strict constrution. In the absence of clear implication such a retrospective legislation will not be given a greater retrospectivity than is expressly mentioned. It will not be construed to authorise the Tax Authorities to reopen the assessments where the turnover of milk powder was not subjected to tax by granting exemption based on the interpretation of

the relevant entry as made prior to or after the judgement of the Gujarat High Court in the case of Chunilal (supra).

26. On careful examination of the provisions of the impugned Ordinance and the Act, we find no express or implied intention in their provisions for holding that the Legislature thereby sought to reopen all previous assessments completed and closed under the Parent Act where `milk powder' on the basis of the unamended entry in Schedule I was not subjected to tax. In our opinion such intention or meaning cannot be read in the impugned legislation as it would have very unjust results in for the dealers who had entered into transactions of sale of milk powder but treating the item as exempt from Sales Tax, did not charge any sales tax from the retailers. In our considered opinion, the impugned legislation has a limited retrospective operation to the cases in which turnover of milk powder was subjected to assessment and levy of Sales Tax and where the recoveries on that basis of the tax are due or already made. The impugned legislation has no effect on cases of the dealers in which milk powder was neither assessed nor subjected to tax on the assumption that being included in the unamended sub-entry (i) of entry (x) of Schedule I, it was exempt from sales tax.

27. As a result of the detailed discussion of several legal aspects of the case, we do not find any constitutional infirmity in the impugned Ordinance/Act. We find it a perfectly valid piece of legislation. On interpretation of the provisions of the impugned Act and Ordinance, we have come to the conclusion that the provisions of the impugned legislation have limited retrospective operation so as to affect the cases of dealers in which on the basis of sub-entry (i) of entry (x) of Schedule I, as it existed prior to its amendment by the impugned legislation - the turnover of milk powder was assessed and subjected to tax. We hold that the impugned legislation has no retrospective operation on cases of the dealers in which on the unamended sub-entry (i) of entry (x) of Schedule I - the turnover of milk powder was not assessed and subjected to tax and to all such proceedings of assessments completed or closed and also those which may be pending at the Appellate Revisional Reference or Rectification stage.

28. It is made clear that whereever the petitioners have been assessed to tax on turnover of milk powder and tax have been recovered, the Ordinance and the Act would have retrospective operation - hence the petitioners

would not be entitled to claim any refund. The relief claimed by the petitioner for refund is rejected.

29. The petitions therefore only partly succeed by restraining the respondents as Tax Authorities under the Gujarat Sales Tax Act from reopening the assessments or subjecting the turnover of milk powder to tax in cases of petitioners as dealers who were neither assessed or subjected to tax in their assessment cases on the basis of the unamended sub-entry (i) of entry 10 of Schedule I prior to coming into force of the impugned Act and the Ordinance i.e. 11.1.1995. In view of the partial success of the petitioner, we would direct the parties to bear their own costs.

(D.M.Dharmadhikari, CJ)

(A.R.Dave, J)

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